COURT NO.2

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Income Tax Appeal No.78 of 2001
(Old No. 365 of 2000)

1. Mr. Garcia Fernando, through M/S Foramer, France
2. Mr. Gonzalez Jean, through M/S Foramer, France
3. Mr. Shell Jarry, through M/S Foramer, France
4. Mr. Margarida Sebatien, through M/S Foramer, France
5. Mr. Papke Robert, through M/S Foramer, France
6. Mr. Van Heuveh, through M/S Foramer, France

..... Appellants

Versus

1. The Commissioner of Income-tax (appeals) Dehradun
2. The Income Tax Officer, Special Ward, Dehradun

..... Respondents

Coram: Hon'ble P.C. Verma, J.
Hon'ble J.C.S. Rawat, J.

Dated: November 30, 2005

This appeal has been preferred against the judgment and order dated 28.07.1999 passed by Income Tax Appellate Tribunal in ITA No.1079/Del of 1991, 1080/Del of 1991, 1081/Del of 1991, 1082/Del of 1991, 1083/Del of 1991, 1084/Del of 1991, 1085/Del of 1991, 1086/Del of 1991 and 1087/Del of 1991. The said appeal was filed against the order of Commissioner of Income Tax (Appeals) Dehradun dated 20.11.1990 passed in the case of each of the assessees.

2. Brief facts of the case-giving rise to this appeal are that all the assessees in these cases are technicians employed by foreign non-resident company to execute certain jobs in India from ONGC undertaken by employer foreign non-resident company. The Assessing Authority passed an order imposing income tax on the salary earned or received outside India for the period when they were not physically present in India and were enjoying their off period. The First Appellate Tribunal as well as Commissioner of Income Tax (Appeals) affirmed the order of the

Assessing Authority. Accordingly, the questions that have been framed for the answer by this Court are as follows: -

(A) Whether in the facts and circumstances of the case, the Income Tax Tribunal was right in law in arriving at the conclusion that the Explanation to Section 9(1)(ii) of the Income Tax Act, 1961 as amended by Finance Act, 1999 could be said to be retrospective in operation and to apply from 01.04.1962?

(B) Whether the Explanation to Section 9(1)(ii) as substituted by the Finance Act, 1999 be described as declaratory or clarificatory in nature?

3. These questions were answered by the Division Bench of this Court in the favour of the Revenue Department in the case of Commissioner of Income Tax and another Vs. Sedco Forex International Drilling Co. Ltd. reported in (2003) 264 ITR 320. The Special Leave Petition was filed against the judgment by the Sedco Forest International Drilling Co. Ltd., which was converted into Civil Appeal Nos.351-355 of 2005. The Hon'ble Apex Court in "**Sedco Forex International Drill Inc. and Others Vs. Commissioner of Income Tax, Dehradun and Another, JT 2005(9) SC 639**" has held that since the Explanation to Section 9(1)(ii) of the Income Tax Act, 1961 was amended by the Finance Act 1999 and was prospective, therefore, it could not be made applicable in the previous years i.e. to say that no retrospective effect can be given to the Explanation, if the assessment proceedings are pending after the said amendment and accordingly the judgment of Division Bench of this Court was set aside as the assessment year in dispute was prior to 1999.

4. In the present case also, the assessment year is prior to 1999, thus the assessee cannot be taxed in view of the law laid down by the Hon'ble Apex Court "**Sedco Forex**

International Drill Inc. and Others Vs. Commissioner of Income Tax, Dehradun and Another (Supra).

5. Accordingly, the appeal is allowed. The questions are answered accordingly. No order as to costs.

(J.C.S. Rawat, J.) **(P.C. Verma, J)**

Rajeev Dang